# Book Review

***Aboriginal Dispute Resolution***
**Larissa Behrendt, Federation Pres**
**Reviewer: Robyn Davis**

The author of this book is an Aboriginal lawyer. She has embarked upon a course of exploring the possibility of developing a traditional dispute resolution system. The book should be read in the understanding that the author's views are as a matter of logic influenced by her experiences in life and accordingly she brings a subjective view to her topic.

In her book, Larrisa Behrendt outlines the difficulties Aboriginal and Torres Strait Island people are confronted with when they become participants in the Australian legal system. She describes the present day legal system as being the "dominant legal system".

The dialogue is somewhat passionate and the prose direct. It is difficult for the reader not to feel both concern and empathy when the author describes the injustices and inequalities that the present day legal system visits upon Aboriginal and Torres Strait Island people.

The author's exploration of a method of resolving disputes which involve at least one Aboriginal and Torres Strait Island party is well considered.

The book concentrates on alternative dispute resolution methods specifically in respect of disputes involving land. She describes land as being central to Aboriginal existence and survival. She explains simply and clearly the ways in which non-indigenous Australians and indigenous Australians view land. There is a brief discussion of the Mabo decision and of the now somewhat fragile Terra Nullius principle.

The author starts with the observation that the present legal system is not capable of acknowledging cultural values of Aboriginal societies and because of this she asserts that alternatives to court litigation must be made available to Aboriginal people.

The system she proposes contains the following fundamental principles: it must be based on traditional dispute resolution processes and must reflect the values of the particular indigenous community.

The author states that the model could be used as a pre-litigation option. Three examples are given as to the way in which the proposed dispute resolution mechanism could be applied in traditional, rural and urban Aboriginal communities.

Included in the process are the following cultural values: community involvement, egalitarianism, oral presentations, cooperation, respect for elders, including female, consensus and flexibility of procedure.

The facilitators would be a council of elders. The arena, a public outdoor place and the format would involve the elders controlling the proceeding. People would be required to sit in a circle with the elders. The author views this as providing a communal aspect to the proceedings which would remove the focus from any individual.

The complainant would be permitted to verbalise his/her concerns. emotion would be permitted, After hearing the complaints, the elders would then explain the traditional law and following on from this the opposing party would be permitted to speak. After both parties had their opportunities to voice concerns the elders would determine the dispute.

The author proposes that non-Aboriginal people involved in a dispute over a land matter and the Aboriginal party should approach the indigenous community and participate in the dispute resolution process. Ms Behrendt believes that this would address the "enormous power differential" that exists.

Throughout the book, an incorporation of traditional conflict resolution practices

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# Supreme Court Notes

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laws. His Honour ruled that the Act is invalidated by the operation of the Constitution itself.

**COMMENTARY**

The High Court was clearly prepared to concede the power of a state to legislate for the preventative detention of specific persons or classes of persons. What was offensive to the Commonwealth Constitution was making the Supreme Court the instrument of such a legislative plan.

**Criminal Law - Insanity - Sections 109 and 112 *Justices' Act***

Keighran -v- Lowndes & Wild
SC No 71 of 1996

Judgment of Thomas J delivered 13 September 1996 (unreported)

The plaintiff sought Supreme Court relief in respect of an order made by the first defendant committing the plaintiff for trial to the Supreme Court on a number of charges. At the conclusion of evidence for the prosecution, the first defendant found that there was sufficient evidence to commit for trial (section 109). He then advised the plaintiff of his right to give evidence and/or call evidence from witnesses.

The plaintiff elected not to give evidence but called evidence from two psychiatrists who both expressed the view that a jury could find him legally insane.

The first defendant was of the view that evidence of insanity could not form part of the consideration of the evidence by a committing magistrate. He described it as a "classic jury issue" and proceeded to commit the plaintiff for trial (section 12).

The plaintiff's counsel at the committal hearing had urged the first defendant to consider the evidence going to his client's mental state on two bases -

1. whether a jury could reasonably arrive at a conclusion other than that the plaintiff was legally insane; and (in the alternative)
2. if the first defendant could not consider insanity, whether there was sufficient evidence of specific intent to warrant a committal for trial.

Her Honour was referred to the decision of *Hawkins -v- R* where the High Court ruled that -

1. evidence of mental disease is inadmissible on the issue of voluntariness unless it is capable of supporting a finding of insanity; but
2. evidence of mental disease is admissible on the issue of the specific intent required for murder under the Tasmanian Criminal Code.

**HELD**

Committal proceedings are not an appropriate forum for considering matters such as insanity where the onus of proof is on the defendant. The first defendant had not acted in error.

The plaintiff's application was refused.

**COMMENTARY**

Her Honour, like the first defendant, declined to rule on whether the rationale in *Hawkins* is applicable to Northern Territory law. The plaintiff has appealed this decision.

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into the "dominant legal system" is argued for strongly.

The proposal in respect of urban Aboriginal and Torres Strait Island people greatly interested me. The author is able to dispel myths in a very straightforward way. At page 76 she states:

"There seems to be some problem with non-Aboriginal people conceptualising the autonomy of urban Aboriginal communities. The appearance may be one of integration because of the physical position of the community, but the physical integration is deceptive. An urban Aboriginal person would feel a stronger connection with an Aboriginal person living in a rural , even a traditional setting than with a non-Aboriginal person living next door or working on the desk opposite them".

Ms Behrendt does not regard her proposed model as being fully developed and definite, and her proposal cannot be viewed in that light.

After reading the book one cannot help but wonder if and when the equation will ever be equal. The book is thought provoking and well worth reading.